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E.O. 12958: DECL: 10/31/2017
TAGS: PHUM PINS PREL PTER SU
SUBJECT: SUDAN: MFA AMENDMENTS TO DETAINEE TRANSFER
FRAMEWORK

REF: A. A) FERNANDEZ-WILLIAMSON 10/30/07 TELECON
 1B. B) KHARTOUM 1583 AND 1601
 1C. C) KHARTOUM 1465
 1D. D) STATE 129835
 1E. E) KHARTOUM 73

Classified By: Assistant Secretary Jendayi Frazer for reasons
1.4 (b) and (d).

Summary

11. (C) In its ref B note verbale, the GOS proposes three amendments to the detainee transfer framework that the USG proposed in the Embassy,s ref D note. The USG seeks clarification of the reasons for the amendments and, more importantly, seeks to persuade the GOS to accept the language proposed in the Embassy,s note. Consistent with discussions between Charge d,Affaires Fernandez and S/WCI Ambassador-at-Large Williamson in ref A telcon, however, Department has crafted the instructions that follow with a view to providing Post some flexibility in negotiating the final language of the framework, within the parameters of the USG,s &red lines8 on the form and substance of the assurances we seek, as discussed below. See action requests in paragraphs 2 and 3. End summary.

Objectives

12. (C) Department requests that Post:

-- Seek clarification of the reasons for the amendments the GOS proposes;

-- Attempt to persuade the GOS to accept the language proposed in the Embassy,s note or, alternatively, language that satisfies the USG,s &red lines8 on the form and substance of the assurances we seek, as discussed below;

-- Renew the USG,s request that the GOS confirm, in writing, that it concurs in the understandings set forth in the Embassy,s note or, alternatively, understandings that satisfy the USG,s &red lines8 on the form and substance of the assurances we seek, as discussed below; and

-- Inquire whether the ICRC would be an agreeable third party for purposes of verifying the GOS,s compliance with its humane treatment assurances.

Reporting Deadline

¶3. (C) Department requests that Post report the results of its efforts, and any new information that Post learns about the likely treatment of the detainees upon their return, by November 8.

Background

¶4. (C/REL SUDAN) The detainee transfer framework that the USG proposed in ref D contained the standard assurance that the USG seeks with respect to restrictions on travel by individuals returned from detention at Guantanamo from all countries to which the USG intends to transfer such individuals (hereinafter referred to as "transferred persons"). The GOS's proposed amendment to the language regarding this assurance adds the phrase "based on evidence obtained by the relevant authorities."

¶5. (C) It is unclear what the GOS seeks to accomplish with this change or whether it would constitute a significant deviation from the original text. If the GOS's intent is only to emphasize that the laws of Sudan include an evidentiary threshold for imposing restrictions on travel, then the proposed language may be redundant but not objectionable. However, if the proposed amendment is designed to reflect the GOS's intent to make a decision on travel restrictions contingent on information USG authorities provide, it would cross a "red line." The USG previously has provided information about the Sudanese detainees to help the GOS build their own files, but the GOS should not expect that such information would form the sole basis upon which the GOS would seek, in accordance with their laws, to restrict the travel of transferred persons. Without further clarification of the GOS's intentions, the USG cannot accept the proposed amendment.

¶6. (C/REL SUDAN) Similarly, the detainee transfer framework that the USG proposed in ref D contained the standard assurance that the USG seeks with respect to USG access to transferred persons in furtherance of the objectives of preventing, countering, investigating, or prosecuting acts of terrorism. The GOS's proposed amendments to the language regarding this assurance change "is to grant ... access" to "may grant ... access" and reposition the phrase "as appropriate" within the sentence.

¶7. (C) The first of these two proposed amendments -- changing "is to grant ... access" to "may grant ... access" -- would constitute a significant deviation from the original text and would cross a "red line" for the USG. The language contained in the Embassy's note is the standard language the USG uses for transfer agreements with all receiving countries and, therefore, the USG must ask for language consistent with this from the GOS. Additionally, the access the USG seeks is consistent with the USG's desire to continue cooperation with the GOS on counter-terrorism matters more broadly.

¶8. (C) It is unclear what the GOS seeks to accomplish with the second of these two changes -- repositioning the phrase "as appropriate" within the sentence -- and whether the change would result in a significant deviation from the original text. If the proposed amendment merely reflects the GOS's grammatical preference and/or a subtle shift of emphasis without changing the meaning or effect of the assurance, then the proposed language may not be objectionable. Without further clarification, however, the USG cannot accept the proposed amendment.

¶9. (C/REL SUDAN) In its ref E note requesting the return of Sudanese nationals from Guantanamo, the GOS made the following statement with respect to access to

transferred persons for purposes of verifying their humane treatment after their return: "The Sudanese authorities have no objection to arranging meetings for the representatives of foreign authorities with the released detainees to observe their treatment whenever needed." The USG interpreted this statement as an offer by the GOS to provide the USG or a mutually agreed third party access to transferred persons in the custody of the GOS to verify the GOS's compliance with assurances that it is to treat transferred persons humanely and in accordance with the laws and international obligations of Sudan, including the Convention Against Torture.

¶10. (C/REL SUDAN) The detainee transfer framework that the USG proposed in ref D recast this statement into the standard access assurance that the USG seeks from all countries to which the USG intends to transfer detainees. The GOS's proposed amendments to the language regarding this assurance change &is to grant ... access⁸ to "may grant ... access" and limit the access that the GOS &may grant⁸ to a mutually agreed third party, which appears to exclude the USG.

¶11. (C) The first of these two proposed amendments -- changing &is to grant ... access⁸ to &may grant ... access⁸ -- would constitute a significant deviation from the original text and would cross a &red line⁸ for the USG. The language contained in the Embassy's note is the standard language the USG uses for transfer agreements with all receiving countries. The language that the GOS proposes would weaken the standard commitment and implies that the GOS might refuse access under some circumstances. Finally, the access the USG seeks is consistent with representations the GOS previously made regarding access in its ref E note. For all of these reasons, the USG is unwilling to dilute the access assurance by changing &is to⁸ to &may.⁸ (Note: The proposed change is particularly puzzling given the GOS's previous indications that the transferred individuals are not likely to be detained. End Note.)

¶12. (C) The second of these two proposed amendments -) limiting the access that the GOS is to grant to a mutually agreed third party and excluding the USG -- is less problematic, considering the "either-or" nature of the assurance the USG seeks. An assurance that the GOS "is to" grant access to a mutually agreed third party would suffice. However, in its efforts to persuade the GOS to accept the language proposed in the Embassy's note, Post might stress the following: that the "either-or" language in the original text already enables the GOS to limit access to a mutually agreed third party; that the "mutually agreed" qualifying language in the original text ensures that the GOS will have an equal voice in selecting a third party; and that the USG's general preference, in practice, is to seek third-party access rather than USG access. Post also should note that the third party most commonly selected by mutual agreement with receiving countries is the ICRC and inquire whether the ICRC would be an agreeable third party in this case. If not, then Post should ask the GOS to indicate what third party would be acceptable and seek Department's clearance before finalizing the arrangement. (Note: While it is not necessary to include the name of the third party in the exchange of notes, it is important to have a firm and reliable understanding with the GOS on the identity of an acceptable party before finalizing the exchange of notes, and the final resolution of this issue should be reported back via front channel cable. End note.)

¶13. (C) In discussions with the GOS, Post should highlight the fact that resolution of these issues will result in a detainee transfer framework that will facilitate the return not only of the two Sudanese detainees currently approved for transfer, but also the return of Sudanese

detainees approved for transfer in the future. Post also should highlight the USG's desire to continue cooperation with the GOS on counter-terrorism matters more broadly.

Point of Contact

¶14. (SBU) Department point of contact for this request is S/WCI) Mark Stamilio at (202) 647-5234 or StamilioMA2@state.sgov.gov.

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